

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-220973

DATE: February 27, 1986

MATTER OF: L.L. Rowe Company

DIGEST:

1. Where the invitation required bidders seeking waiver of first article testing to identify the contract under which the item or similar items had been tested and approved, the contracting agency reasonably denied waiver where the only contract identified by the bidder was a 1968 contract. Although the invitation failed specifically to request information about items accepted by the government under more recent contracts, the bidder should have known to identify such contracts for the purpose of obtaining waiver or to raise the matter prior to bid opening.
2. Failure to notify protester of award to another bidder is merely a procedural deficiency and does not affect the validity of an otherwise properly awarded contract.

L.L. Rowe Company protests the award of a contract for 226 electrode assemblies to the Connector Technology Corporation (CTC) under Navy Ships Parts Control Center (SPCC) invitation for bids (IFB) No. N00104-85-B-0584. The invitation required first article testing by the government, but permitted waiver of the requirement where identical or similar items had been previously tested, evaluated and approved under identical or similar specifications. Bidders were able to offer separate prices on the basis of first article testing and waiver. The invitation provided that if first article testing was required, its estimated cost (\$3,080) would be added to the bid price for evaluation purposes. Rowe, whose bid price was low before the addition of this factor, maintains that the SPCC should have waived the testing requirement in evaluating its bid.

We deny the protest.

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Bidders were advised in the invitation to submit the following information in order to permit a determination of whether first article testing could be waived: the federal stock number of the item tested; the applicable drawing or military specification for that item; the approving agency; the test reference number; and the contract number under which the item was approved.

Both CTC and Rowe submitted information for the purpose of obtaining waiver. CTC indicated that the item had been tested and approved by the Portsmouth Naval Shipyard in 1973 under a contract with the predecessor company to CTC. The SPCC 5-year procurement history showed that the predecessor company had been a historic supplier of the item and that CTC itself supplied the assembly as late as 1984 under a SPCC contract. SPCC therefore waived the article testing requirement for CTC. The Rowe information showed that its item had been tested and approved in 1968 by the Defense General Supply Center, Defense Logistics Agency. However, Rowe did not appear in the SPCC 5-year procurement history as having performed any contract for this or a similar item with SPCC. Instead, SPCC files showed Rowe's last contract with SPCC to have been awarded in 1973. Because an SPCC internal instruction stated that first article testing was appropriate where the product, although previously tested and approved, had not been produced for an "extended period of time" or where testing had not occurred within 2 years, waiver was not granted in the case of Rowe.

Rowe's unit price without waiver was \$274.45 as compared to CTC's unit price of \$277.46 on the basis of first article waiver. Adding the costs of testing to Rowe's total price resulted in an evaluated price of \$65,105.70 as compared to CTC's price of \$62,705.96. The agency therefore awarded CTC the contract, which has been completed.

Rowe argues that it could have identified in its bid numerous recent contracts under which other agencies had accepted similar items, but that the only information the IFB required was the contract under which Rowe's electrode assemblies had been tested and approved. Rowe believes that it was the responsibility of the contracting agency to ask for additional information from a bidder regarding the bidder's recent or current production of the assembly.

The agency explains that since Rowe's bid contained no information regarding recent or current Rowe contracts for the assembly, and since SPCC records showed the last SPCC contract for this item to have been awarded in 1973, it was reasonable for the agency to conclude that Rowe had not recently produced the item. The agency notes that, in this regard, the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9-303(b)(2) (1984), states that first article testing may be appropriate where production of a tested/approved item "has been discontinued for an extended period of time."

The decision whether to waive first article testing is an administrative one that is essentially within the discretion of the contracting agency. Steam Specialties Co., Inc., B-218156, May 14, 1985, 85-1 CPD ¶ 541. In deciding whether to waive first article testing, the agency may rely on any information in its possession or any information available prior to award. Keco Industries, Inc., B-208742, Nov. 19, 1982, 82-2 CPD ¶ 459. While the agency may seek information from any source after bid opening and prior to award, the agency is not obliged to search for information, beyond what is already in its possession, in an attempt to establish whether first article testing should be waived for a bidder. Cf. Stocker & Yale, Inc., B-207016, July 6, 1982, 82-2 CPD ¶ 21 (holding that information not presented by the bidder is irrelevant to the propriety of the agency's decision not to permit waiver).

Based on the information available to the agency, which indicated only that Rowe had prior approval in 1968, SPCC reasonably determined that waiving first article testing was not appropriate. See Amplitronics, Inc., B-209339, Mar. 1, 1983, 83-1 CPD ¶ 210. As noted by SPCC, applicable procurement regulations provide that first article testing may be appropriate where production of the item has been discontinued for an extended period of time, and SPCC lacked any basis to know that Rowe had been continually producing the item.

Regarding Rowe's contention that it provided the precise information requested by the invitation, we conclude that the invitation was deficient in requesting information only about items previously tested and approved rather than information about items previously delivered by the bidder and accepted by the government. The FAR, 48 C.F.R. § 9.306(c), requires that solicitations containing a testing and approval requirement inform

offerors that the requirement may be waived when identical or similar items to those being procured have been delivered by the offeror and accepted by the government. Had this solicitation so informed offerors, the protester would have been on notice that to get a waiver it should provide information regarding previously accepted items, and not only information concerning items previously tested and approved.

The protester, however, also bears responsibility for the situation in which it finds itself. Since it purports to be an experienced contractor that had supplied electrode assemblies to other agencies on several recent occasions, it should have known to provide information regarding recent item acceptance by the government, or at the very least, to raise the matter of just what would be required for waiver with SPCC prior to bid opening. See Arrow Engineering, Inc., B-215585, Dec. 26, 1984, 84-2 CPD ¶ 702.

We therefore will not sustain this protest merely because of the solicitation defect. By separate letter, however, we are advising the Secretary of the Navy of the invitation's deficiency and recommending that the waiver clause be corrected in future solicitations.

Rowe also points out that CTC itself had not previously obtained approval of its electrode assemblies. Rowe does not dispute, however, that CTC's predecessor company had obtained such approval, and the contract history of a predecessor company may qualify the successor company for waiver. Keco Industries, Inc., supra.

Finally, Rowe complains that it received no formal notice of the award, but learned of the award nearly a month after it was made when Rowe called SPCC and inquired about the procurement's status. This complaint provides no basis to question the award since the failure to notify an unsuccessful bidder that a contract has been awarded is a procedural deficiency and does not affect the validity of an otherwise properly awarded contract. Appletown Food Service and Management Corp.--Reconsideration, B-218201.5, July 1, 1985, 85-2 CPD ¶ 5.

The protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel